



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

June 18, 2008

The Honorable Robert Tata
Member, House of Delegates
4536 Gleneagle Drive
Virginia Beach, Virginia 23462

Dear Delegate Tata:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You inquire about financial assistance provided pursuant to Article VIII, § 10 of the Constitution of Virginia to students who attend two- or four-year degree programs at private, for-profit, nonsectarian, postsecondary career colleges. Specifically, you ask whether such assistance may take the form of loan or grant funds: (1) made available directly to the students, (2) appropriated to a career college on behalf of a student, or (3) appropriated to the State Council of Higher Education for Virginia. Finally you ask whether an entity other than the State Council may be named in or created by legislation to distribute the loans or grants directly to the student or an institution or to both.

Response

It is my opinion that student financial assistance provided pursuant to Article VIII, § 10 of the Virginia Constitution may take the form of loan or grant funds made available directly to students, appropriated to a career college on behalf of a student, or appropriated to the State Council of Higher Education for Virginia. It further is my opinion that another entity may be named in or created by legislation to distribute the loans or grants directly to the student or an institution.

Background

You refer to a 2007 opinion of the Attorney General¹ (the “2007 Opinion”) that addressed the question of whether students attending private, for-profit, nonsectarian, postsecondary career colleges are eligible to participate in state-funded financial assistance programs established under Article VIII, § 10. The 2007 Opinion concluded that the General Assembly may appropriate financial assistance directly to such schools for the benefit of students enrolled in such schools who are seeking degrees rather than certificates or diplomas.² You seek additional guidance concerning the form and the method of distribution of such funds.

¹ See 2007 Op. Va. Att’y Gen. 42.

² *Id.*

Applicable Law and Discussion

Article VIII, § 10 of the Virginia Constitution provides that the General Assembly “may ... subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of ... collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning.” Prior opinions of the Attorney General have analyzed this constitutional provision and have concluded that students who are enrolled in non-profit, private schools and those enrolled in for-profit private schools in a program leading to a degree are constitutionally eligible for state-funded financial assistance under § 10.³

While § 10 sets out eligibility criteria, it is silent on the form the contemplated aid may take. “[T]he accepted canon of construction applicable to the Constitution of [Virginia is] that it is a restraining instrument, and that the General Assembly of the State possesses all legislative power not prohibited by the Constitution.”⁴ “The Legislature of the State has plenary legislative power except where it is restricted by the Constitution of the State, or of the United States.”⁵

The first clause of § 10 prohibits the appropriation of public funds to any school or institution that is not owned or controlled exclusively by the Commonwealth or one of its political subdivisions. The three exceptions following the first clause do not place restrictions on the type of funding or on the method of appropriation. However, § 10 does restrict the applicability to schools that are “public or nonsectarian private schools and institutions of learning.” Further, § 10 requires that the funds be appropriated “for educational purposes” at the “elementary, secondary, collegiate or graduate” levels. Nothing prohibits the General Assembly from appropriating funds in any particular manner. In my opinion, § 10 merely provides that the General Assembly appropriate such funds subject to the restrictions identified in the Constitution and those imposed by the General Assembly itself. Based on the language contained in § 10, it appears that all of the forms of aid about which you inquire are permissible.

Furthermore, the Supreme Court of Virginia has examined § 10 in reviewing the constitutionality of certain acts of the General Assembly.⁶ “Section 10 of Article VIII permits financial aid, *without restriction as to form*, to students in public institutions” and “to students in nonsectarian private schools.”⁷ Thus, the Supreme Court has confirmed that the limitations set out in § 10 govern the basic issue of eligibility for aid, but do not restrict the form which that aid may take.⁸

³ See Op. Va. Att’y Gen.: 2007, *supra* note 1, at 42; 1998 at 24; 1982-1983 at 97, 97-98. Please note that the only financial assistance programs currently available for students attending nonstate colleges and universities are established under Article VIII, § 11 rather than under Article VIII, § 10. Under § 11, the assistance is available only for students of nonprofit institutions of higher learning. See VA. CODE ANN. § 23-38.10:9 (Supp. 2007) (Two-Year College Transfer Grant Program); § 23-38.12 (2006) (Tuition Assistance Grant Program).

⁴ Whitlock v. Hawkins, 105 Va. 242, 248, 53 S.E. 401, 403 (1906).

⁵ Prison Ass’n v. Ashby, 93 Va. 667, 670, 25 S.E. 893, 894 (1896).

⁶ Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634 (1973)

⁷ *Id.* at 179, 198 S.E.2d at 640 (emphasis added).

⁸ See Whitlock, 105 Va. at 248, 53 S.E. at 403; Ashby, 93 Va. at 670, 25 S.E. at 894; see also City of Richmond v. Va. Ry. & Power Co., 141 Va. 69, 91, 126 S.E. 353, 359 (1925) (noting that Virginia Constitution is restraining instrument and not grant of power).

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Conclusion

Accordingly, it is my opinion that student financial assistance provided pursuant to Article VIII, § 10 of the Virginia Constitution may take the form of loan or grant funds made available directly to students, appropriated to a career college on behalf of a student, or appropriated to the State Council of Higher Education for Virginia. It further is my opinion that another entity may be named in or created by legislation to distribute the loans or grants directly to the student or an institution.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, reading "Robert F. McDonnell". The signature is written in a cursive style with a large, stylized "R" and "M".

Robert F. McDonnell